REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

APPELLATE SIDE

CRIMINAL APPEAL NO. 22 OF 2012

(From the original conviction and sentence in criminal case no. 38 of 2010 of the Chief Magistrate's Court at Malindi before Hon. D W Nyambu – SPM)

FRANCIS KAHINDI MWAIHA ……..……APPELLANT

VERSUS

REPUBLC.……..……RESPONDENT

JUDGMENT

1. The appellant herein, and another by the name Ramadhan Kahindi Kai were charged in the Lower Court with the offence of Defilement contrary to Section 8(3) of the Sexual Offences Act, in that, on 29th August, 2010 at *[Particulars Withheld]* within Malindi District, he caused penetration of his genital organ into the genital organ of MSK, a girl aged 13 years. He denied the charges but following a full trial was convicted and sentenced to ten years imprisonment. He has now appealed to this court against both conviction and sentence.

2. In the amended grounds of appeal he raised six grounds. Grounds 2 to 5 attack the weight of the prosecution evidence upon which the conviction was based while ground 6 is a compliant that the appellant's defence was not given due consideration. Ground 1 asserts that the charge as laid was defective. The appellant relied on his home-made submissions on the hearing of the appeal. The appeal was opposed by the State, through Mr. Nyongesa.

3. As has been stated in the case **Okeno v R 1972 EA 32** the duty of the first appellate court is to consider afresh the evidence tendered at the trial and to draw its own conclusions. In **R v Oyier [1985] KLR 385** the court said that the appellate court will not assail any findings based on the credibility of witnesses called during the trial, unless those findings are plainly wrong and no reasonable tribunal could have reached them

4. The prosecution case in the Lower Court was as follows. On 29th August, 2010 the complainant MSK was left at their home in *[Particulars Withheld]* by her parents who went to a farm a distance away. In the night, she was lured away by two women known to her, namely A J and Mamake C to accompany them on an errand for which she was promised payment. They led her to the home of one Kahindi wa Thoya after giving her a sum of Shs. 100/-. The trio entered a house where they met the appellant and his co-accused in the Lower Court.

5. The guests were offered black tea by the appellant, and soon after the complainant's companions

said they were going to Mtangani instructing the complainant to wait for them to return. Before long, she became groggy and fell into a deep sleep but was aware that the two men were having sex with her in turns. When she woke up on the next day she was at her home, bloodied and with pain in her genitalia. She told her father R K. what had happened. He took her to the police station and later the hospital where a clinical officer Ibrahim Abdullahi (PW3) examined her and confirmed penetration. The appellant was arrested and charged. In his defence the appellant maintained a denial of the offence.

6. Regarding the complaint by the appellant that the charge was defective, it is true that it is always desirable for a charge under Section 8 to include Section 8(1) of the Sexual Offences Act, but failure to do so does not render a charge defective (See **Amedi Omurunga v R [2014] eKLR.**) The appellant fully participated in the trial and cannot be said to have been prejudiced by the omission to cite Section 8(1) of the Sexual Offences Act. He clearly understood the charges facing him.

Section 134 of the Criminal Procedure Code states:

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

In my view, no prejudice was occasioned by the failure to cite Section 8(1) of the Sexual Offences Act in addition to the penalty Section 8(3).

7. Regarding the evidence, there can be no doubt at all from the complainant's and PW3's evidence that there was penetration. However, I am troubled by two facts:

a. The complaint was reportedly drugged/unconscious when the defilement occurred

b. The two ladies, namely Mama C and A.J who her father (PW2) knows as relatives were not called as witnesses. These persons in my view were necessary in this case to explain if they were the persons who took the complainant home and her state at the time. It does not matter that they would have given evidence adverse to the prosecution case. They would have shed light on the circumstances in which the complainant found herself with the two men, and ultimately whether the complainant's evidence on the sexual assault and in particular, the identity of the assailants is reliable. This is because her evidence on the same is prima facie difficult to appraise.

8. The complainant testified that after taking the black tea offered by the appellant she lost consciousness and fell asleep but "felt the two accused persons having sex with me."

If the evidence of PW2 is to be believed, PW1 was still in deep slumber and was semi-conscious on the next morning. These descriptions of the complainant's state in my view required careful examination to confirm if indeed the complainant was in any position to identify the person who sexually assaulted her on the material night.

9. In addition to not calling the two women above, the prosecution did not call any member of the Thoya wa Kahindi homestead to testify, yet PW1 said when she arrived there were other persons in the home. In the case of **Bukenya & Others v Uganda [1972] EA 549** the court stated that an adverse inference ought to be made where the prosecution fails to call, without any explanation, a necessary witness and asserted that the state must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

10. The complainant having admittedly passed out, and not having been proved to have been collected from the appellant's house later that night or early on the next day, even the circumstantial case against the appellant collapses. The trial magistrate stated in her judgment that she examined the

demeanor of the complainant and found her a trustworthy witness. That was barely sufficient in this case in my view. In addition to the demeanor the court should have examined the admitted semiconscious state of the complainant during the sexual attack to satisfy itself her evidence on events that allegedly happened to her in that state could be believed. The trial court would have arrived at a different conclusion in my opinion if it addressed its mind to this aspect.

11. Another area of concern relates to the production of the complainant's "clinic card" by the investigating officer (PW5) as an exhibit. This vaccination card was not shown for identification purposes to any of the witnesses, in particular the complainant and her father before production. Secondly none of the two witnesses gave any evidence relating to the complaint's age. It is true that the P3 form indicated the estimated age of the complainant to be 13 years, but the court placed reliance on the irregularly produced vaccination card as proof of age.

12. In view of the foregoing observations, I consider the conviction for the offence of defilement contrary to section 8(3) of the Sexual Offences Act unsafe in the circumstances of this case. However, there is evidence that the complainant knew the appellant who gave her black tea on the material night. He did not address this fact when in his defense, he denied defiling her. And that she passed out upon drinking the tea. That evidence is unchallenged. The intention of complaint could not have been lawful at all, as the complainant was proved to have been defiled subsequently, and most possibly in the appellant's home.

13. In my considered view, the facts proved by the prosecution at the trial establish that the appellant intentionally administered an unknown substance laced into the tea to the complainant, with the intention of stupefying her, to enable a third party engage in sexual intercourse with her. The appellant's conviction for the offence of defilement contrary to section 8(3) of the Sexual Offences Act is therefore quashed and substituted therefor with a conviction for the offence of Administering a Substance with Intent contrary to Section 27 of the Sexual Offences Act. This Section attracts a minimum sentence of ten years imprisonment and I therefore confirm the sentence imposed by the Lower Court, albeit for a different offence.

In the circumstances, the appeal has no merit and is dismissed.

Delivered and signed at Malindi this **30th** day of **July, 2014** in the presence of the appellant, Mr. Nyongesa for state.

Court clerk – Samwel.

C. W. Meoli

JUDGE